IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1398

JOEL SHIFFRIN, ET AL.,

Petitioners,

vs.

EARL BRATTON, ET AL.,

Respondents.

FIRST NATIONAL BANK OF HIGHLAND PARK,
A NATIONAL BANKING ASSOCIATION,

Petitioner,

vs.

ROGER CHAPMAN AND JEANNE CHAPMAN, INDIVIDUALLY, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The respondents, Earl Bratton, et al. and Roger Chapman and Jeanne Chapman, jointly, respectfully request that this Court deny the petition for writ of certiorari seeking review of the Seventh Circuit's decision in this matter.

OPINIONS BELOW

These two cases, which are the subject of the petition here, were consolidated for appeal by the Seventh Circuit. The opinion of the court of appeals is reported at 585 F. 2d 223 (7th Cir. 1978). The decision of the court of appeals in these cases was entered on September 18, 1978. Petitioners' motion for rehearing and rehearing *en banc* was denied on briefs on January 11, 1979. The opinion of the District Court is reported at 440 F. Supp. 1257 (N. D. Ill. 1977).

QUESTION PRESENTED

Whether the court of appeals properly applied *Cort* v. *Ash*, 422 U. S. 66 (1975), in determining that an implied private right of action exists in favor of respondents who prepaid for charter air transportation pursuant to provisions of the Federal Aviation Act and related regulations and who received neither the transportation nor a refund because of violation of the Act and its regulations.

STATEMENT IN OPPOSITION

The writ should be denied because the decision below does not raise any questions not already considered in the scores of cases applying the *Cort* analysis since its announcement. Respondents are disappointed travelers and travel agents who prepaid for charter tours that were cancelled when the tour operators were declared bankrupt. The petitioners were responsible for the custody and maintenance of respondents' prepayments under regulations issued by the Civil Aeronautics Board (CAB) pursuant to section 401(n)(2) of the Federal Aviation Act (FAA), 49 U. S. C. § 1371(n)(2). These regulations, called the "Special Charter Regulations," imposed stringent safeguards on the handling of tour prepayments. 14 C. F. R. Part 378; 14 C. F. R.

Part 378a (1976). Thus, the prepayments were to be paid to and held in an escrow account with a depository bank until the tours were provided (14 C. F. R. §§ 378.16(b), 378a.31(b)), and in the event of cancellation the bank was to make applicable refunds directly to tour participants. Id. §§ 378.16(b)(iv), 378a.31(b)(iv).

Pursuant to the Special Charter Regulations, petitioners First National Bank of Highland Park and its vice-president, Joel Shiffrin, agreed, at the request of the tour operators, to be the depository of respondents' funds, and filed with the CAB its undertaking to safeguard and, if necessary, to refund, the prepayments. When these operators were found bankrupt and the tours were cancelled, the petitioners were holding insufficient funds in the depository escrow account to refund respondents' prepayments. Respondents brought suit against petitioners and others for, among other things, violation of the Special Charter Regulations, including petitioners' failure to segregate and protect respondents' prepayments.

The district court dismissed the action on the grounds that respondent tour participants had no right of action to enforce obligations under the Special Charter Regulations, *sub nom. Chapman* v. *First Nat'l Bank*, A. 1-15, 440 F. Supp. 1257 (N D. Ill. 1977). The Seventh Circuit reversed. *Bratton* v. *Shiffrin*, A. 16-34, 585 F. 2d 223 (7th Cir. 1978). After an exhaustive analysis of the operation of the regulations, their legislative history, consideration of the CAB's inability to take adequate action to remedy the precise wrong which Congress sought to prevent, and the inability of other forums to provide effective relief, the court below concluded, pursuant to *Cort* and its progeny, that a private right of action exists in favor of the respondents. A. 30; 585 F. 2d at 232.

The mandate of the court of appeals issued after petitioners failed to file their petition for certiorari within the time limit set out by that court. However, on petitioners' subsequent motion in the district court, further proceedings were stayed pending this Court's action on the petition for certiorari.

REASONS FOR DENYING THE WRIT

I. The Decision of the Court of Appeals Was Faithful to and Consistent with the Decisions of This Court.

This case, in which the court of appeals followed established precedent of this Court in implying a cause of action in favor of respondents, would not seem to raise questions that would merit this Court's review.

The controlling case on whether a private remedy is implicit in a statute not expressly providing one is *Cort* v. *Ash*, 422 U. S. 66 (1975). (The use of the *Cort* analysis in deciding whether to imply a cause of action has been re-endorsed by this Court as recently as April of this year in *Chrysler Corp.* v. *Brown*, 47 U. S. L. W. 4434 (April 18, 1979)). The four tests set out in *Cort* were faithfully and conventionally applied by the Seventh Circuit, and although this Court has never deemed it necessary for all four factors to be present, all four, as the court of appeals found, have been met in this case.

Applying the first factor of the *Cort* analysis, the Seventh Circuit found (a point not disputed by petitioners here) that the purpose of section 401(n)(2) of the Federal Aviation Act, 49 U. S. C. § 1371(n)(2), and the Special Charter Regulations is to protect travelers, such as respondents, from the specific injury set out in the respondents' complaints: their inability to obtain refunds of their prepayments when their charter tours were cancelled. A. 23-25; 585 F. 2d at 228. Thus, the respondents are members of the class for whose "especial benefit" section 401(n)(2) of the FAA was enacted.

Applying the second *Cort* factor, the Seventh Circuit thoroughly analyzed the statute, regulations, and their legislative history. The court acknowledged that the Federal Aviation Act has, since its original enactment, provided a limited private remedy in section 1007, 49 U. S. C. § 1487, which, if viewed out of context, might indicate congressional intent to preclude other private remedies. A. 25; 585 F. 2d at 228. Petitioners

argue (*Petition* at 6-9) that the court should have ended its analysis with this observation. However, in accordance with this Court's admonition in *Cort* to refrain from unwarranted "extrapolation[s] of legislative intent" from silence (422 U. S. at 82, n. 14), the court went on to note that section 401(n)(2), which speaks of making "appropriate compensation" to travelers when transportation is not provided, was added to the Act in 1962, long after Section 1007 was enacted (a provision which was in fact adopted unchanged from the Civil Aeronautics Act of 1938, 1958 U. S. CODE CONG. & AD. NEWS 3741, 3758). The court further found from later legislative history an express congressional concern with the uncompensated traveler:

> [I]ndeed, as recently as *Cort*, 422 U. S. at 84, we were reminded that effectuation of the congressional purpose is paramount. In this case, we think that Congress' recent concern with the plight of uncompensated travelers, which resulted in two enactments that postdated the enactment of Section 1487(a), the general remedial provision, indicates that if Congress did not expressly consider the issue of private enforcement of the [Special] Charter Regulations, nor did it intend to deny a remedy. The application of *expressio unius* in this context would serve only to frustrate the goal of assuring adequate security for travelers' compensation.

A. 26; 585 F. 2d at 230.

This reasoning is hardly in conflict with the rationale of the decisions in *Securities Investor Protection Corp.* v. *Barbour*, 421 U. S. 412 (1975) ("SIPC"), and *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U. S. 453 (1974) ("AMTRAK"), and in particular with the application in those cases of the doctrine of *expressio unius*. This maxim at best is but an aid to statutory construction, and an unreliable tool with which to discern legislative intent at that. See 77 HARV. L. REV. 285, 290-292 (1963). It therefore cannot be said that the result of its application in SIPC and AMTRAK demands its application here with the same result,

since the maxim and its role, if any, depends on the particular statute under scrutiny. The statutes involved in SIPC and AMTRAK provide for a clear remedy by an agency for the particular wrong. In contrast, the court of appeals in this case explicitly found that the CAB's enforcement authority under Section 1007 was questionable and that that agency was by its own admission unable to enforce the legislative scheme. A. 27-28; 585 F. 2d at 230-231. The Seventh Circuit's conclusion that the existence of an express statutory remedy in another context was not determinative of whether other private remedies were intended to be excluded, is in fact the same conclusion reached by this Court in *Cort* v. *Ash*, 422 U. S. at 82, n. 14.

Applying the third *Cort* test the court below considered whether the implication of a private action was consistent with the underlying purpose of the legislative scheme in question. Having already determined that the purpose of the legislation in question was to protect travelers from economic loss, the court considered whether the CAB had the ability to enforce the regulations. The Seventh Circuit was mindful of this Court's admonition in *Cort*, that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." A. 26; 585 F.2d at 230, citing *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964); See also *Cort* v. *Ash*, 422 U. S. at 84. Since it was clear to the Seventh Circuit in light of the CAB's explicit representations to the district court that it could not as a practical matter enforce the regulations, and since it was doubtful that the CAB even had the statutory authority to recover the prepayments requested by respondents if the CAB elected to attempt it, the court below properly concluded that it was consistent with the underlying purpose of the legislative scheme to imply a private action in favor of respondents to recover their prepayments.

> [I]n a case such as this, where practical limitations are combined with a clear possibility that agency action may never be adequate to remedy the precise wrong which Congress sought to prevent, we think that a federal court must be willing to permit private remedial measures to better effectuate compliance with federal goals.

A. 27; 585 F. 2d at 230.

Finally, the Seventh Circuit thoroughly considered the fourth *Cort* factor, determining that a federal forum was appropriate because the case is not one traditionally relegated to state law. Regulation of air travel, unlike regulation of corporations and the sale of their securities, is not an area where Congress is overlapping federal statutes upon a pre-existing state scheme. Rather, since the onset of commercial aviation, pervasive federal regulation has preempted state law. *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U. S. 624, 633-634 (1973); *Northwest Airlines* v. *State of Minnesota*, 322 U. S. 292, 303-304 (1944) (Jackson J., concurring). *Cf. British Airways Board* v. *Port Authority of N. Y. & N. J.*, 558 F. 2d 75, 84 (2d Cir. 1977); *Village of Bensenville* v. *City of Chicago*, 16 Ill. App. 3d 733, 738, 306 N. E. 2d 562, 566 (1973). The court of appeals reasoned that although respondents' causes of action were not inconsistent with common law theories of liability, essential elements of each of their theories are based on duties created by federal law, namely the Federal Aviation Act and the Special Charter Regulations. Since the petitioners' duties and possible defenses can be determined only by the Act and the regulations, the court below correctly viewed respondents' causes of action as rooted in federal law, and, recognizing the need for uniformity of interpretation of that law, properly determined that a federal forum was more appropriate for the trial of these issues. A. 29-30; 585 F. 2d at 232.

This routine application of *Cort* would not seem to warrant this Court's review. The factors in *Cort* require a quantitative analysis. The petitioners here are dissatisfied with that analysis and its result. However, the analysis was carefully and faithfully applied in this case, as it has been applied in scores of

cases since it was announced by this Court in 1975. Petitioners of course argue (*Petition* at 11, 13-14) that this case will open the floodgates of litigation. This argument not only fails to speak to the issue of whether the court of appeals properly applied *Cort* v. *Ash*, but also ignores the fact that the decision here is, in actuality, a very narrow one, and the facts upon which it was based are unlikely to recur.[1] The present case merely reaffirms the efficacy of the analytical approach announced in *Cort*.

II. The Court of Appeals' Decision Is Not in Conflict with any Decision of Other Circuits or of the Seventh Circuit

Petitioners suggest that the ruling below conflicts with three Third Circuit decisions, *Polansky* v. *Trans World Airlines, Inc.*, 523 F. 2d 332 (3d Cir. 1975), *Rauch* v. *United Instruments, Inc.*, 548 F. 2d 452 (3d Cir. 1976), *Wolf* v. *Trans World Airlines, Inc.*, 544 F. 2d 134 (3d Cir. 1976), *cert. denied*, 430 U. S. 915 (1977), each of which dealt with other sections of the Federal Aviation Act. It is true that the result in this case differs from that in *Polansky*, *Rauch* and *Wolf*, but difference in result alone certainly cannot be considered a "conflict." Most importantly, the substantive holdings of those cases are not inconsistent with the holding here. Each of the above cases turned on the application of the first *Cort* test, and in each of those cases the court denied a private remedy because it found that the plaintiffs did not suffer the type of injury that the statute was intended to prevent.[2] In this case, in contrast, it is clear

1. The Special Chapter Regulations have been revoked and replaced by "Public Charter Regulations." 43 Fed. Reg. 36603 (August 18, 1978). The new regulations eliminate the requirement of prepayment as a condition of tour participants receiving the lower charter fares from tour operators. 43 Fed. Reg. 36604 (August 18, 1978).

2. In *Polansky* the purpose of the statute was to insure free access to air transportation facilities; plaintiffs who, under Section 404 of the Act, 49 U. S. C. § 1374(b) claimed to have been furnished inferior ground accommodations in connection with a flight, were held

(Footnote continued on next page.)

that the type of injury suffered by respondents was the exact injury that section 401(n)(2) of the Federal Aviation Act and the Special Charter Regulations were intended to prevent.

Nor is this case in conflict with the Seventh Circuit's decision in *Cannon* v. *University of Chicago*, 559 F. 2d 1063 (7th Cir. 1976), *cert. granted*, ... U. S. ....., 98 S. Ct. 3142 (1978), where the Seventh Circuit refused to imply a private cause of action under Title IX of the 1972 Education Amendments to the 1964 Civil Rights Act. (In their petition for rehearing and suggestion for rehearing *en banc*, petitioners pressed the supposed conflict of *Cannon* on the Seventh Circuit without success.) *Cannon* concerned another agency, another statute and an entirely different problem (age and sex discrimination). Applying the *Cort* analysis, the Seventh Circuit found in *Cannon*, both congressional intent to deny a private remedy and an administrative agency clearly authorized to enforce the statutes with the authority to obtain the required relief. Strictly speaking, *Cannon* is a "failure to exhaust administrative remedies" case, not an "implied right of action" case, for, in sharp contrast to this case, a federal agency not only had the clear authority to seek the relief desired by the plaintiff, but there were also well-defined administrative procedures for doing so. Thus, *Cannon*, even if correctly decided below, does not appear to represent a conventional application of *Cort*, since Congress' intention with regard to private remedies was there express although perhaps not unequivocal.

(Footnote continued from preceding page.)

not to be within the class for whose especial benefit that section was enacted. In *Rauch*, plaintiffs, who claimed to have suffered economic loss due to the purchase of faulty altimeters, were not within the class of persons intended to be protected by Section 601, 49 U. S. C. § 1421, and regulations, the purpose of which was to insure the physical safety of travelers. In *Wolf*, plaintiffs, who were forced to forfeit free guest accommodations because of the deceptive practices of an airline, were denied a private right of action under Section 403, 49 U. S. C. § 1373(b) because the section at issue was designed to implement tariff regulations and not prevent the type of injury suffered by plaintiffs there.

III. This Case Is Not Yet Ripe for Review in This Court.

This case has not yet proceeded to an answer in the district court. All discovery was stayed at the outset of the litigation, and the case was dismissed. The court of appeals has reversed the case and remanded it to the district court. All proceedings are stayed pending the disposition of this petition. Thus, proceedings below are currently interlocutory. In this posture a grant of certiorari may well be premature. *See, e.g.*, Stern & Gressman, *Supreme Court Practice*, 5th Ed. (1978) at § 4.19, pp. 300-302 and cases cited therein.

CONCLUSION

This case represents a routine application of the four *Cort* "tests." Indeed, the court of appeals' decision here is a good example of the type and quality of analysis this Court foresaw as resulting from *Cort*. Not only does this case present no new issues of law, but the well-reasoned decision demonstrates that *Cort* is a perfectly adequate formula for implied private right of action cases, a position this Court has repeatedly endorsed. In addition, the decision of the Seventh Circuit does not conflict with the decision of any other court. Also, since the posture of this case is currently interlocutory, a review of the court of appeals' decision would be premature.

For the foregoing reasons, respondents respectfully submit that the petition for writ of certiorari should be denied.

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